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Supreme Court, U.S.
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No. 97-516

In the Supreme Court of the United States

OCTOBER TERM, 1997

DENNIS HARKER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this Chapter 13 bankruptcy case was properly dismissed because it was filed in bad faith.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Eisen, In re, 14 F.3d 469 (9th Cir. 1994)	4
Gier, In re, 986 F.2d 1326 (10th Cir. 1993)	4
Harker v. *Commissioner*, 82 F.3d 806 (8th Cir. 1996)	2
Kestell, In re, 99 F.3d 146 (4th Cir. 1996)	4
Knight, In re, 55 F.3d 231 (7th Cir. 1995)	5
Lilley, In re, 91 F.3d 491 (3d Cir. 1996)	4, 5
Love, In re, 957 F.2d 1350 (7th Cir. 1992)	4, 6
Molitor, In re, 76 F.3d 218 (8th Cir. 1996)	4
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	5
United States v. *Verdunn*, 89 F.3d 799 (11th Cir. 1996)	5

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	
Ch. 1:	
11 U.S.C. 109(e)	2, 3, 5
Ch. 3:	
11 U.S.C. 362(a)	2, 5
Ch. 7	3
Ch. 13	2, 3, 4, 5
11 U.S.C. 1307(c)	2, 3, 4
Internal Revenue Code (26 U.S.C.):	
§ 6213(a)	4
§ 7481	4
§ 7485	4

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 12-14), the district court (Pet. App. 10-11) and the bankruptcy court (Pet. App. 1-9) are unpublished, but the decision of the court of appeals is noted at 112 F.3d 513 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1997. A petition for rehearing was denied on June 20, 1997 (Pet. App. 15). The petition for a writ of certiorari was filed on September 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, petitioner pleaded guilty to tax evasion. The Internal Revenue Service thereafter issued a notice of deficiency that determined substantial deficiencies in tax and additions to tax for petitioner (Pet. App. 2, 12). Petitoner sought review of those determinations in Tax Court. In May 1995, that court entered a decision finding petitioner liable for the deficiencies and additions to tax (*ibid.*).

Two weeks later, before filing a notice of appeal from the Tax Court decision, petitioner filed a petition for relief under Chapter 13 of the Bankruptcy Code (Pet. App. 2, 12-13). Upon the filing of that bankruptcy petition, the automatic stay imposed by 11 U.S.C. 362(a) prevented the taxes associated with the Tax Court proceedings from resulting in liens on petitioner's property. In addition, the automatic stay permitted petitioner to stay collection of the adjudicated tax debt pending appeal of the Tax Court decision without posting an appeal bond (Pet. App. 13).[1] See note 2, *infra*.

The bankruptcy trustee and the United States moved to dismiss the Chapter 13 petition because (i) petitioner's debts exceeded the maximum permitted for a Chapter 13 petition (11 U.S.C. 109(e)) and (ii) the petition was filed in bad faith (11 U.S.C. 1307(c)). After conducting a hearing, the bankruptcy court held that the particular facts of this case and the totality of the circumstances reflected that the Chapter 13 petition had not been filed in good faith (Pet. App. 7). The court concluded that petitioner had filed his bankruptcy petition as a litigation tactic to avoid

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[1] The decision of the Tax Court was subsequently affirmed. *Harker* v. *Commissioner*, 82 F.3d 806 (8th Cir. 1996).

posting an appeal bond from the Tax Court decision. The court noted that the United States was petitioner's only unsecured creditor and that petitioner's debt to the government was a potentially nondischargeable, priority claim (*id.* at 8, 13). The court concluded that petitioner's bad faith bankruptcy case should be dismissed under 11 U.S.C. 1307(c) or, if petitioner made a timely request, converted to a liquidation proceeding under Chapter 7 (Pet. App. 7-9). The court further stated that, because the Chapter 13 case was properly dismissed for bad faith, it was unnecessary to address the alternative question whether petitioner's debts exceeded the maximum permitted for a Chapter 13 case under 11 U.S.C. 109(e) (Pet. App. 8). When petitoner did not move to have the case converted to a Chapter 7 proceeding within the time permitted, the case was dismissed by the bankruptcy court.

2. The district court upheld the bankruptcy court's ruling (Pet. App. 10-11). On appeal to the Eighth Circuit, the court of appeals affirmed. The court of appeals concluded that the findings of the bankruptcy court were supported by the record and, in particular, that the court's finding that this bankruptcy case had been brought in bad faith was not clearly erroneous (*id.* at 13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 1307(c) of the Bankruptcy Code, a bankruptcy court "may convert a case under [chapter 13] to a case under chapter 7 of this title, or may

dismiss a case under [chapter 13], whichever is in the best interests of creditors and the estate, for cause * * *." 11 U.S.C. 1307(c). A sufficient "cause" for dismissing a bankruptcy case is a lack of "good faith" in filing the petition. *In re Kestell*, 99 F.3d 146, 148 (4th Cir. 1996); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996); *In re Molitor*, 76 F.3d 218, 220 (8th Cir. 1996); *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994); *In re Gier*, 986 F.2d 1326, 1329-1330 (10th Cir. 1993); *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992). Whether the debtor lacked good faith in filing the Chapter 13 petition is a factual determination made "on a case-by-case basis in light of the totality of the circumstances." *In re Lilley*, 91 F.3d at 496. Accord *In re Molitor*, 76 F.3d at 220; *In re Eisen*, 14 F.3d at 470; *In re Gier*, 986 F.2d at 1329; *In re Love*, 957 F.2d at 1355, 1359. Applying this standard, the courts below properly concluded that petitioner's Chapter 13 bankruptcy petition was not filed in good faith.

After the Tax Court entered its decision sustaining the deficiencies determined by the Commissioner, it became possible for the Internal Revenue Service to take action to assess and collect the unpaid liabilities unless an appeal bond was posted by petitioner.[2] Petitioner did not, however, post the required bond.

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[2] Under Section 6213(a) of the Internal Revenue Code, if a Tax Court petition is filed after the issuance of a notice of deficiency, no assessment or collection of the deficiency shall be made "until the decision of the Tax Court has become final." 26 U.S.C. 6213(a). A Tax Court decision is generally not "final" for this purpose until 90 days after it is entered or the completion of any further judicial review. 26 U.S.C. 7481. The Code further provides, however, that appellate review "shall not operate as a stay of assessment or collection" unless an appropriate appeal bond has been filed. 26 U.S.C. 7485.

Instead, shortly after the Tax Court decision was entered, petitioner filed a Chapter 13 bankruptcy petition and thereby invoked the automatic stay under 11 U.S.C. 362(a). That action provided him substantially the same protection against tax collection that an appeal bond would have provided (Pet. App. 12-13). Since the United States was his only unsecured creditor, the bankruptcy filing had no material consequence other than permitting the appeal of his tax case to proceed without the necessity for posting a bond (*id.* at 13). The courts below correctly concluded that the Chapter 13 bankruptcy case was not brought in good faith, for it served only as "a litigation tactic to avoid posting an appeal bond" (*ibid.*).[3]

The dismissal of this Chapter 13 case for bad faith rests upon factual determinations concurred in by all three courts below. Further review of these factual determinations is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

2. Petitioner errs in contending (Pet. 8-9) that the decision in this case conflicts with the decision of the Third Circuit in *In re Lilley*, 91 F.3d 491, 495 (1996),

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[3] The schedules filed with petitioner's bankruptcy petition further demonstrate that he was unconcerned with eligibility for Chapter 13 relief when he filed his petition. Those schedules state that petitioner had fixed and liquidated unsecured debts in excess of $250,000 and thus showed on their face that petitioner did not quality for relief under Chapter 13 (Pet. App. 3). See 11 U.S.C. 109(e). The failure of petitioner to satisfy the eligibility requirements of 11 U.S.C. 109(e) provides an alternative basis for dismissal of the Chapter 13 petition in this case. See *United States* v. *Verdunn*, 89 F.3d 799 (11th Cir. 1996); *In re Knight*, 55 F.3d 231 (7th Cir. 1995).

and the decision of the Seventh Circuit in *In re Love*, 957 F.2d 1350 (1992). Petitioner states that these decisions reflect the general rule that a "fact intensive inquiry [is required] to support a dismissal of a chapter 13 petition for bad faith, and the burden is on the creditor to develop those facts as a matter of record" (Pet. 8). Nothing in the decision in the present case is inconsistent with that proposition. Indeed, in reviewing the factual determinations of the courts below, the court of appeals cited *In re Love* with approval (Pet. App. 13).

The court of appeals reviewed the entire factual record of this case. As petitioner notes (Pet. 5-6), that record consists of four exhibits and offers of proof made by petitioner's counsel at the bankruptcy court hearing. Based upon a review of this record, the court of appeals concluded that the finding of bad faith made by the bankruptcy court was not clearly erroneous (Pet. App. 13). Petitioner is simply incorrect in contending that the court of appeals made "its decision with no inquiry whatsoever on the record" (Pet. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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